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CITATIONS

722698—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 538

HERMAN BERMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 36–50; see also R. 56–57 [1]) and dissenting R. 50–56) opinions in the circuit court of appeals are reported at 156 F. 2d 377.

JURISDICTION

The judgment of the circuit court of appeals was entered June 29, 1946 (R. 59), and a petition for rehearing (R. 61–66) was denied August 27, 1946 (R. 69). The petition for a writ of cer-

[1] The record is in two volumes labeled "Transcript of Record" and "Supplemental Transcript of Record." We shall refer to the former as "R." and to the latter as "S. R."

tiorari was filed September 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether a selective service registrant whose opposition to war is not founded upon a sense of responsibility to divine authority and who disclaims affiliation with any religious sect or organization, but who is found to be a political objector to war, is entitled to exemption from military service as a person who, "by reason of religious training and belief," is conscientiously opposed to participation in combatant and noncombatant military service.

STATUTE AND REGULATION INVOLVED

Section 5 of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 305 (g)) provides, in part, as follows:

> (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is

> inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

Section 622.51 of the Selective Service Regulations provides in pertinent part:

> (a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

STATEMENT

On November 22, 1944, petitioner was indicted (R. 2–3) in the District Court of the United States for the Southern District of California in one count charging that on October 18, 1944, he wilfully refused to submit to induction into the armed forces, in violation of Section 11 of the Selective Training and Service Act of 1940. At petitioner's trial before the court, a jury having been waived (R. 4–5), it was stipulated that he reported to the induction station on October 18 and that he refused to submit to induction (R. 16). Petitioner's counsel informed the court that petitioner's sole defense was that the classifying

boards had misconstrued the provision of Section 5 (g) of the act exempting conscientious objectors from military service as meaning that a registrant who does not believe in a deity and who is not connected with an organized religion is not entitled to its benefits. Counsel further stated that petitioner did not contend that the boards acted arbitrarily in classifying him; that his defense involved "purely a question as to the meaning of the law." (R. 17–18.) In support of this defense, petitioner's selective service file was admitted in evidence (R. 21), and the court heard testimony from petitioner concerning the nature of his beliefs (R. 19–22) and from the chairman of petitioner's board of appeal concerning the proceedings before the board when petitioner was finally classified (R. 22–26). Petitioner was convicted and sentenced to imprisonment for a term of three and one-half years (R. 6–7).

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed by the court sitting *en banc,* Judge Denman dissenting (R. 36–58, 59).

The pertinent information revealed by petitioner's selective service file may be summarized as follows:

On February 14, 1942, petitioner registered with local Board No. 228 in Los Angeles, California (R. 15), and on June 6, 1942, he filed his questionnaire (S. R. 1–9). In that document petitioner

stated, *inter alia,* that he was 21 years old (S. R. 2); that he was employed as a shipping clerk (S. R. 2); and that he desired classification in class IV as one exempt from military service (S. R. 7). At the same time petitioner filed the "Special Form for Conscientious Objectors" (S. R. 10–13), in which he stated that he was opposed to combatant and noncombatant military service. He described his beliefs as follows (S. R. 10):

> Democracy cannot be served by going to war. The way to serve democracy is to cultivate and extend it—to make it work—where even only a semblance of it exists. Through abolition of restrictions on our democracy, political and economic (poll taxes, etc.), not only would democracy be served, but society as a whole would be benefited. This would be preliminary to a social order based on the mutual understanding of human needs, and hence resulting in the cooperative commonwealth.

In describing the source of these beliefs, petitioner stated (S. R. 10):

> In 1936, I began to realize the causes of recurring wars and depressions. At that time, I resolved to learn more about it. Though the following books and publications convinced me, they did not advocate or ask anyone to become a conscientious objector. This I have done of my own accord, fully realizing the possible consequences. "As I See It"—by Norman

> Thomas. "Other People's Money"—Louis Brandeis. "War Madness"—Stephen Raushenbush. "Is Conscience a Crime?"—Norman Thomas. "Walls and Bars"—Eugene V. Debs. "Merchants of Death"—Fortune Magazine, 1934. "Nye Committee Investigation of Munitions". "The Fellowship"—Publication of the Fellowship of Reconciliation. "The Call"—Socialist Party organ.

Petitioner expressly stated in the form that he is not a member of any religious sect or organization (S. R. 12), and in answer to the question asking the name of the "individual upon whom you rely most for religious guidance," petitioner stated, "I rely on no one for religious guidance" (S. R. 11). In response to a question concerning his organizational activities, petitioner said (S. R. 12):

> Young Peoples' Socialist League—joined in 1937. Have distributed literature and collected funds for victims of war and oppression. Youth Committee Against War—joined in 1939. Was L. A. secretary. Workers Defense League—joined in 1940. Collected funds and clothing to help victims of poverty among sharecroppers and tenant farmers. Also helped to collect funds to defend politically oppressed in the United States. Socialist Party, joined in 1940. Helped in struggle to keep America out of war, and to create a better and more desirable society. Hollywood Consumers' Cooperative Association—helped build a people's

business, a movement to take profit out of business.

In a supplement to the conscientious objector form, petitioner described the purposes and activities of the various organizations with which he was connected (S. R. 15). At the same time, he submitted a supplemental statement "to explain my conscientious objection to war" (S. R. 15–16), in which he said:

> American boys are dying and killing on battlefronts on every continent; on all the seas and in the air—throughout the world—supposedly to preserve the freedom we have known in the United States.
>
> As I thought and publicly stated for several years, I continue to affirm that the present war is a continuation of conditions prevailing before the last war and following the Treaty of Versailles, and is an integral part of the social system and economic system under which we live.
>
> Some of the other factors involved in this whole vicious cycle are exploitation, poverty, unemployment, vice, crime, disease (pellagra—prevalent in many of our potentially wealthiest areas), scarcity amidst potential abundance, totalitarianism, (Hitlerism, Stalinism, Mussolinism, Hirohitoism), etc.
>
> Totalitarianism is directly traced back to those factors I mentioned above. To do away with it is to do away with the others.
>
> * * * These social injustices are increased in time of war, and become more

> difficult to eradicate in each succeeding war. This is to cite but a few of the injustices in America.
>
> Therefore, for the sake of humanity, and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort. * * *

On July 28, 1942, the local board unanimously classified petitioner I–A, and he thereupon appealed to his board of appeal (S. R. 8). The board of appeal referred the case to Department of Justice Hearing Officer C. H. Hartke, who conducted a hearing on petitioner's claim to exemption as a conscientious objector. Petitioner appeared at the hearing, together with seven witnesses, who furnished information on his behalf. In addition, the Hearing Officer had before him a report of an extensive investigation of petitioner conducted by the F. B. I. A summary of the evidence adduced at the hearing is contained in the Hearing Officer's report (S. R. 16–29). On the basis of the evidence adduced at the hearing, together with the information contained in petitioner's selective service file, the Hearing Officer recommended that petitioner be classified in I–A, and in support of the recommendation he detailed his conclusions as follows (S. R. 28–29):

> * * * it is impossible for the Hearing Officer to believe that the registrant "by reason of *religious training and belief*" is conscientiously opposed to participation

in war in any form. It is believed that registrant is sincere insofar as his belief and desire to promote the socialist party and its various kindred organizations are concerned. Undoubtedly he feels that he is justified in taking this very definite positive stand against the present situation of our government and advocating a new order, and placing into effect and carrying out a socialistic principle and form of government. His whole thesis, his entire argument and discussion is based thereon and no doubt he is doing a great good in his effort to help the needy and to promote their welfare and better conditions for them. However, having in mind the provisions of the Act and the decision of the United States Circuit Court of Appeals for the Second District, in the case of the *United States of America* v. *Mathias Kauten*, appellant, (1943) and the statement of the Court therein, it is impossible for this Hearing Officer to conclude that the registrant is entitled to deferment by reason of any opposition to war by reasons of "religious training and belief." As stated by the Court therein "the conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based on 'religious training and belief'." Even though the registrant may be utterly sincere for other reasons, in his opposition to

> military service, undoubtedly as was the situation in the case cited, the registrant in this instance objects to war largely by reason of his philosophical and political views.
>
> Registrant's vehement advocacy of socialism and his socialistic ideas as to our present form of Government, especially insofar as same is responsible for present war situation, together with his record of activity along this line of thought, the preparation and distribution of literature in support thereof together with his oft repeated declarations, seem to indicate rather clearly that registrant is definitely a political pacifist. Since he states socialism and his practice thereof constitutes his primary religion, then he could hardly be deemed more than a religious Pacifist if such be a religion rather than a conscientious objector by reason of religious training and belief.

On May 26, 1943, the board of appeal classified petitioner I–A (S. R. 8). Petitioner's classification was thereafter reopened, and on February 1, 1944, the local board determined that the I–A classification was proper (S. R. 8). Petitioner again appealed to the board of appeal and that board referred the case to Department of Justice Hearing Officer J. R. Files for a second hearing on petitioner's claim to classification as a conscientious objector. On August 10, 1944, petitioner, accompanied by his attorney and witnesses,

appeared before the Hearing Officer, and the facts upon which he predicated his claim to exemption were again set forth (see S. R. 29–34). The Hearing Officer recommended against petitioner's claim to exemption, stating the reasons for this conclusion as follows (S. R. 31–34):

> There can be no doubt that one without membership in any orthodox church might be profoundly moved by conscience; it is no doubt true that one without membership in any church might be conscientiously opposed to war as a result of "religious training and belief." In this case it is hardly a question of what might be; it is a question of what the clear, overwhelming, and unmistakable evidence points to as the motivation of Registrant in his determined opposition to participation in war in any manner whatsoever. That he is against war in any form, there can be no doubt; that he is sincere in the belief that war is sheer futility, I heartily agree; that he is determined that he shall have not part in this war, the record clearly sustains; but that Registrant is opposed to war as a result of any religious training or belief, I do not find a shred of evidence to support. It may well be that Registrant is conscientious in his complete belief in socialism; he may have been conscientious in his appeal to communists to join in a vigorous opposition to war, capitalism, and government policy with which he had no sympathy; but as I conceive it, that is not the essence

of conscientious objection to war based upon religious training and belief. I find no evidence whatsoever that Registrant's objection to war stems from any other source than social and political concepts.

* * * * *

I believe that Registrant is sincere in his effort to promote the Socialist Party, in his belief that war is futile, and in his diagnosis of this war as a war for the benefit of capitalists. He has plenty of courage; he is, and long before Pearl Harbor was willing to espouse his opposition to war whether the case was popular or unpopular, whether practical or impractical. If he stood alone he would oppose this war and would fight our participation in it as zealously—even with equal futility—as King Canute, who tried to turn back the tides; all of this I believe regarding the conduct and the character of Registrant. I do not believe that there is an ounce of conscientious objection to military service as referred to in the Selective Service Act. I regard much of the reasoning in support of his position as pure sophistry, regardless of the sincerity with which he attempts to make his case. He is as much opposed to our form of government as he is to the participation in war by this nation. If he is conscientiously opposed to one by reason of "religious training and belief," he is equally opposed to the other on the same ground. He says that socialism is his pri-

> mary religion, and without doubt that is true.
>
> This Hearing Officer finds and Recommends that Registrant should be classified in Class I-A and that his claim as a conscientious objector should be denied.

The board of appeal classified petitioner I–A, and on September 15, 1944, he was notified of this action (S. R. 9). As we have shown above, he was thereafter ordered to report for induction, and after having reported he refused to submit to induction.

ARGUMENT

1. Petitioner conceded (S. R. 11, 12) that he is not affiliated with any religious sect or organization and that he relies on no one for religious training or guidance, and there is no claim that his opposition to military service stems from his responsibility to divine authority. Nevertheless, he contends that he is a conscientious objector to military service "by reason of religious training and belief" within the meaning of Section 5 (g) of the Act. The court below, in rejecting this contention, held that "the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one" (R. 44). This con-

clusion, the court noted, involves views which are "divergent" from those expressed by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Kauten,* 133 F. 2d 703; *United States* v. *Downer,* 135 F. 2d 521; and *United States* v. *Badt,* 141 F. 2d 845.[2] The Second Circuit has broadly construed the statutory language in question as including anyone who by reason of a compelling voice of conscience is opposed to war in any form, even though the source of the objection is not grounded in a belief in an authority characterized by the court below as "higher and beyond any worldly one."

We concede, of course, that there is a conflict in principle between the Ninth Circuit's interpretation of the conscientious objector's exemption and the broad construction which the Second Circuit has given that provision. It is equally clear, however, that on the facts of this case there

[2] In the *Kauten* case the court concluded that the defendant was properly denied exemption from military service because he was an atheist or agnostic whose sincere opposition to war was based on philosophical and political convictions. In *United States* v. *Downer*, the court held that a sincere opposition to war based on humanitarian considerations entitled the registrant to exemption from military service. In *United States* v. *Badt*, the court held that if the registrant's claim to exemption was denied because his opposition to war was based only on humanitarian considerations, the classification was illegal. It was determined thereafter that the registrant had been denied exemption by the Director of Selective Service because the Director found that he was not sincere in his beliefs. See *United States* v. *Badt*, 152 F. 2d 627.

is no conflict between those two circuits and that the administrative decision was grounded upon an interpretation of the statute which was entirely consistent with the decision of the Second Circuit upon which petitioner relies. As we shall show, petitioner was denied classification in IV–E, not because he felt no responsibility to a deity, but because the triers of the facts found that he was a political objector to war, not a conscientious objector. Since even the Circuit Court of Appeals for the Second Circuit recognizes that a political objector to war is not entitled to exemption from military service,[3] there is, we submit, no need to reach the question which the court below decided, i. e., whether an objector to war whose objections do not stem from a sense of responsibility to divine authority is exempt from service.

At petitioner's trial the chairman of the board of appeal was called as a witness for the defendant. He testified (R. 25) that "in this particular case the Board followed the recommendation of the hearing officer in the Department of Justice." As we have shown in the Statement, *supra,* pp. 8–11, the first Hearing Officer to pass on petitioner's case had before him the decision of the Second Circuit in the *Kauten* case, *supra,* and he was

[3] In the *Kauten* decision, *supra*, at p. 707, the Court said: "* * * the conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based on 'religious training and belief.'"

aware of the distinction that court drew between a conscientious objector and a political objector to war. Quoting from the Second Circuit's description of convictions which were not necessarily based upon "religious training and belief" (see note 2, *supra*), the Hearing Officer concluded that petitioner objects to war "largely by reason of his philosophical and political views"; that petitioner's "vehement advocacy of socialism" and his various activities "seem to indicate rather clearly that registrant is definitely a political pacifist," not a conscientious objector (S. R. 28–29). Approximately a year later a second hearing was had before another Hearing Officer. This officer stated his view that "one without membership in any church might be conscientiously opposed to war as a result of 'religious training and belief' " (S. R. 31). But he recommended against petitioner's claim because the "clear, overwhelming, and unmistakable evidence" showed that petitioner's objection to war stemmed from his social and political concepts. Thus, the second Hearing Officer's report states (S. R. 32).

> A perusal of the numerous pamphlets and circulars, of a number of which Registrant says he was the author, indicates that the vigorous and crusading opposition in which Registrant participated so fervently was directed to *this war*. Circular numbered 1 refers to our one-man government bringing about conscription, rationing, and

controlled economy. Pamphlet numbered 2 refers to the unholy alliance between Stalin and Hitler, the viciousness of the Versailles Treaty, and the over-reaching of Chamberlain and Daladier. Pamphlet numbered 6 refers to the coalition between American financiers and the government of Great Britain; the design of American government to solve Europe's problems; the Stalinist bureaucracy in Russia, which is called "pro-Hitlerism"; rejection of an international police force concept; and opposition to all mobilization plans. Pamphlet numbered 7 refers to American youth being "caught on the barbed wire of European battle fields." Resolution numbered 8 refers to the sufficiency of our navy, since it is "Bigger than Great Britain's and larger than the combined navies of the next three to Great Britain's"; quotes from military authorities that "our present armament is more than adequate."

To attribute a religious aspect to an intense devotion to socialism could no more come within the principles enunciated in our Selective Service Act than to attribute a religious aspect to an apoplectic belief that the re-election of President Roosevelt will stop the wheels of progress and forever put out the lights on free *i*nterprise.

In short, it is plain from the reports of the Hearing Officers that they were applying the construction of Section 5 (g) which previously had

been adopted by the Second Circuit, and that they recommended against petitioner's claim, not because he was not affiliated with a religious sect and did not believe in a deity, but because they both concluded that conscience was not the source of his objection to military service, and that his objection to military service rested on political considerations. The board of appeal which finally classified petitioner I–A adopted the recommendation of the Hearing Officers (R. 25), and at his trial petitioner specifically disclaimed that he was attacking his classification on the ground that the board acted arbitrarily in rejecting his claim to exemption (R. 17–18). In these circumstances, we think it is unnecessary to review the conclusions expressed by the court below as to the proper interpretation of the statutory exemption of conscientious objectors. Since even under the doctrine of the Second Circuit invoked by petitioner, he is not entitled to exemption from military service, the question of interpretation concerning which the Second and Ninth Circuits have expressed divergent views need not be reached in this case. For even if it were reached and if this Court adopted the view of the Second Circuit, petitioner, as a political objector to military service, still would not be entitled to classification in IV–E.

2. Petitioner suggests, but does not argue (Pet. 30), that he should be given a new trial because

"the Trial Judge did not review the evidence submitted to the Selective Service Agencies." However, his position in the trial court was that no such issue was tendered. His counsel stated to the trial judge that the case "proposed two questions of law" (R. 17): (1) whether a registrant who refused to submit to induction is in a position to challenge the induction order in the criminal trial (R. 18), and (2) if so, "that the defendant contends not that he was arbitrarily classified, but that the Selective Service Agency misinterpreted the law, misconstrued the phrase 'religious belief' and denied him the classification as a conscientious objector because of an erroneous view which the Selective Service Agency had as to the meaning of 'religious training and belief' " (R. 17). At another point in the trial, petitioner's counsel stated to the court (R. 18):

> Again I want to make myself clear * * * this does not involve a question of an arbitrary classification; doesn't involve a reappraisal by this Court, * * * of facts presented before the Selective Service agency; * * *

Examination of petitioner's briefs in the circuit court of appeals reveals that the contention now urged by petitioner was argued for the first time in a supplemental brief filed after the oral argument of the case.

Plainly, the trial judge could not have erred in failing to inquire whether there was any foundation in fact for petitioner's classification. For in the clearest language possible, petitioner stated and restated in the trial court that he was not defending on this basis; that his sole defense was predicated on his claim that the statutory exemption had been misconstrued. In view of this disclaimer in the trial court, there is no basis for petitioner's belated contention in this Court. Cf. *Johnson* v. *United States,* 318 U. S. 189, 199–201.

3. Petitioner also urges (Pet. 30–32) that the three and one-half year sentence imposed upon him is so excessive that this Court should remand the case for resentence. This contention obviously presents nothing for review by this Court, for the sentence is well within the five-year maximum fixed by Congress in Section 11 of the Selective Training and Service Act. It should be noted also in this connection that petitioner is not without recourse. Rule 35 of the Federal Rules of Criminal Procedure permits him to apply to the district court for a reduction of sentence and that court may, if a sound judicial discretion warrants it, reduce the sentence "within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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